



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

DECISION

v.

[REDACTED] Respondent

FOF/157630

PRELIMINARY RECITALS

Pursuant to a petition filed May 14, 2014, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on July 10, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by lying by omission about his household composition.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Candice Canales, Fraud Investigator
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Petitioner received FoodShare benefits intermittently between January 1, 2011 and March 21, 2013. (Exhibit 12)

2. On December 13, 2010, the Petitioner completed an on-line ACCESS application, in which listed his address to be [REDACTED], but indicated that he was homeless. OP listed only himself in the household. (Exhibit 15)
3. On July 11, 2012, the Petitioner completed an ACCESS application in which he did not provide a specific address, but instead indicated that his address was in care of a person. F.H., in Milwaukee, WI [REDACTED]. In that application the Petitioner again indicted that he was homeless and he only reported himself in the home. (Exhibit 17)
4. On October 15, 2012, the Petitioner completed an ACCESS application in which he indicated that he lived at [REDACTED], Milwaukee WI [REDACTED]. He reported himself and his two year old son, OP, in the home. He also reported F.H. as the absent parent. (Exhibit 18)
5. On December 12, 2012, the Petitioner contacted the income maintenance agency and reported that, "his baby's mother was living there and they split everything, but she moved out last month and now he is fully responsible..." (Exhibit 13)
6. An individual, F.H., had her own open Foodshare case and received benefits from January 1, 2011 through August 31, 2012. (Exhibit 4)
7. On November 10, 2010, the Petitioner completed an on-line ACCESS application, in which she reported an address of [REDACTED] in Milwaukee, WI [REDACTED] but a mailing address on [REDACTED] Street. (Exhibit 6)
8. On June 8, 2011, the F.H. completed an on-line renewal, in which she indicated her address to be [REDACTED]. In that renewal, F.H. indicated that her household consisted of two people, her then one year old child, OLP, and herself. (Exhibit 7)
9. On May 30, 2012, the F.H. completed an on-line six-month report form in which she indicated her address was [REDACTED], Milwaukee WI [REDACTED] and that her household consisted of two people, her then two year old child and herself. (Exhibit 8)
10. On June 2, 2014, the Department of Health Services sent the Petitioner an Administrative Disqualification Hearing Notice, advising him of the hearing on July 10, 2014, and alleging that he withheld information about his household composition between January 1, 2011 and March 31, 2013. (Exhibit 10)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on July 10, 2014. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him [REDACTED]. Ms. Canales indicated that this was the Respondent's last known address and that the agency did not receive any returned mail. (See also Exhibit 11)

The Respondent did not call in before the hearing to provide a phone number. On the date of the hearing, two attempts were made to contact the Petitioner at the number listed in the file, (414) 393-7457, but the outgoing message indicated that no incoming calls were being accepted. The Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear / be available for the hearing. As such, it is found that the Respondent did not have good cause for his non-appearance.

The Merits of OIG's Claim

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

In the case at hand, the OIG alleges that the Petitioner lied by omission between January 1, 2011 and March 2013. Specifically, the OIG alleges that she failed to report the father of her child being in her home. The OIG bases its allegations upon the following:

- 1) In November 2010, F.H. completed an ACCESS application listing an address on [REDACTED]. The following month, in December 2010, the Petitioner completed an ACCESS application stating he was homeless, but also listing the [REDACTED] as his address.
- 2) In May 2011, the Petitioner completed a renewal, listing the [REDACTED] as his address, but again indicated he was homeless. The following month, in June 2011, F.H. completed a Six-Month Report Form, listing the address on [REDACTED].
- 3) In May 2012, F.H. completed a Six Month Report Form, listing an address on [REDACTED]. In July 2012, the Petitioner completed an ACCESS application listing his address as only in care of the Petitioner, but again indicating that he was homeless.
- 4) In October 2012, the Petitioner completed another ACCESS application listing the [REDACTED] address, as his address, but this time, did not claim to be homeless. This application listed F.H. as an absent parent. In December 2012, the Petitioner contacted the Income Maintenance Agency and reported that the unnamed mother of his unnamed child moved out the month before.

Looking at the applications, renewals and Six Month Report Forms, it is reasonable to question whether the Petitioner and F.H. were living together. However, in order to prove the Petitioner lied by omission, OIG must produce clear and convincing evidence of the violation.

The OIG’s evidence is problematic in the following ways:

First, the Summary Investigative Report (Exhibit 22) indicates that excluding the Petitioner from her home might have actually resulted in fewer FoodShare benefits for F.H., since the Petitioner reported no income. This begs the question of why not report him in the home, then, if he's actually there? This also creates the question of whether O.P. lied about his residence and if so, whether the Petitioner knew he was using her residence, when he wasn't living there.

Second, between December 2010 and October 2012, the Petitioner claimed to be homeless when he completed his applications and renewal. As such, this begs the question of whether the Petitioner was, in fact, homeless at the time, but only using F.H.'s address for other purposes. The Confirmed Assistance Group Eligibility History for the Petitioner also shows gaps in his benefits, which makes one wonder if the Petitioner only stopped intermittently at F.H.'s home and therefore, missed reminders about renewals and six month report forms, which again begs the question of whether the Petitioner was actually homeless and not living with F.H.

Third, it is unclear from the record whether the agency believes the Petitioner was truthful, when he reported that the mother of his child moved out in November 2012, and if so, as far as Petitioner is concerned, there was no failure to report F.H. in his household after November 2012, and the allegation spanning to March 2013 is incorrect.

Fourth, given the questions raised about whether O.P. was actually homeless and given the December 2012 case comment that the Petitioner and the unnamed mother of his unnamed child had split expenses, it is unclear from the record whether the Petitioner intentionally violated the rules of the FoodShare program, whether he was being truthful, or whether he simply misunderstood the rules concerning household composition. In short, there is insufficient evidence to establish any intent to violate the rules and regulations of the FoodShare program.

Finally, according to the Summary Investigative Report, the child, OP, was receiving healthcare benefits from the State of [REDACTED] and the "primary person", had used his or her FoodShare benefits in the State of [REDACTED]. (The Investigative Report did not make clear to whom "primary person" referred, but the name under the title of the document was the Petitioner's)

Based upon this information, one also has to wonder whether one of the parents was lying about residing in Wisconsin and if so, whether the other parent was aware of that fact. The record contains no evidence answering these questions. This is troubling, because if one of the parents was lying to receive duplicate benefits from two states, they should be facing a more substantial penalty.

Given all of the foregoing unanswered questions, the applications, renewals, Six Month Report Forms and case comments submitted by OIG are not sufficient to meet the clear and convincing burden of proof.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Petitioner committed an intentional program violation by lying by omission, about her household composition between January 1, 2011 and March 31, 2013.

THEREFORE, it is

ORDERED

That IPV Case Number [REDACTED] is hereby reversed and that the Department of Health Services cease enforcement efforts.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and

why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. See also, 7 C.F.R. sec. 273.16(e)(4) for the specific time limits for claiming good cause for missing the scheduled hearing. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

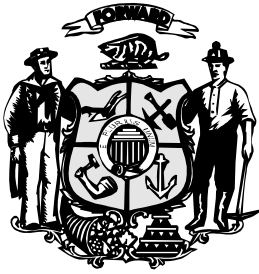
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 25th day of July, 2014.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 25, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
candice.canales@wisconsin.gov